APPENDIX "A"

OPINION OF THE SUPREME COURT OF GEORGIA

APRIL 21, 1982

January

AFFIRMED

63246. COUNIHAN v. DEPARTMENT OF TRANSPORTATION OF GEORGIA et al.

McM-10

McMURRAY, Presiding Judge.

This is a wrongful death action filed by the temporary administrator of the estate of the deceased who was killed in Chatham County in a motor vehicle collison when decedent's automobile slid on ice and was struck by several other vehicles. The named defendants were the department of Transportation of Georgia, Chathan County, i.e., Chatham County Commissioners, the administrator of Chatham County Public Works, individually and in that capacity, and the Chief of Chatham County Police, individually and in his capacity as chief of the county police. The deceased allegedly met her death as she approached the Bull

River Bridge located on a highway within the County of Chatham, State of Georgia, when she lost control of her vehicle as the result of ice which the defendants had allegedly negligently allowed to accumulate on the roadway causing the collison with the bridge and other vehicles, the decedent suffering fatal injuries as the result of same.

The suit against the Department of Transportation is based upon Code Ann. SS 95-304 and 95A-305 (Ga. L. 1972, pp. 947, 983; 1974, pp. 1422, 1428), which has reference to suits directly against the department, as well as the liability of the department for certain suits against counties.

In addition to the answers filed denying the claims both the Department of Transportation and the Chatham County Commissioners filed motions to dismiss based upon sovereign immunity. After consideration of the motions to dismiss, in two separate orders, the trial court dismissed the action based on the ground of sovereign immunity as to the Department of Transportation and as to the remaining defendants, county

commissioners, county police chief, county administrator and county public work chief, on the same ground. Plaintiff appeals.

Held:

1. It is elementary that one cannot sue the state without the state's consent. However, it is the contention of the plaintiff that Code Ann. §§ 95A-304, and 95A-305, supra, constitutes the consent of the sovereign to allow the Department of Transportation to be sued in a wrongful death action such as here. We cannot agree based upon such cases as Tounsel v. State Highway Department of Georgia, 180 Ga. 112, 116 (178 SE 285); State Highway Department of Georgia v. McClain, 216 Ga. 1, 6(114 SE2d 125); Sikes v. Candler County, 247 Ga. 115 (247 SE2d 464); Mayor &c. of Savannah v. Palmerio, 242 Ga. 419 (249 SE2d 224); Miree v. United States of America, 242 Ga. 126 (249 SE2d 573); Crowder v. Department of State Parks, 228 Ga. 436, 439, 440 (185 SE2d 908). Compare National Distributin Company, Inc. v. Department of Transportation, 157 Ga. App. 789 (278 SE2d 648), affd. s.c. 248 Ga. 451 (283 SE2d 470) (said case involving an ex contractu action rather than ex delicto).

2. The above and foregoing cases with reference to the Department of Transportation, as a subdivision of the state, likewise applies to the County of Chatham, i.e., the Chatham County Commissioners, as representatives of the state in their official capacity. See Revels v. Tift County, Georgia, 235 Ga. 333 (219 SE2d 445); Crowder v. Department of State Parks, 228 Ga. 436, 439 (2), supra; Roberts v. Barwick, 187 Ga. 691 (2), 695 (1 SE2d 713). Compare Duffield v. Dekalb County, 242 Ga. 432 (249 SE2d 235). We are of the opinion that the law still is that there has been no waiver of sovereign immunity by legislation or otherwise in the case sub judice may be maintained.

3. The three other officials of Chatham County in their official capacity was also considered. Under the above authority, we see no error in the court to dismissing the complaint as to them in their capacity as officials of the county. That is, as "County Police Chief, County Administrator and County Public Works Chief." We presume that there has been no dismissal of the defendants sued in their individual capacity and make no ruling thereon.

Until such time as the General Assembly or

the case law authorizes such a suit against the state we are bound by the above decisions and find no authority in the briefs which would authorize us to reverse the trial court.

Judgment affirmed. Banke and Birdsong, JJ., concur.

APPENDIX "B"

ORDER BY COURT OF APPEALS OF GEORGIA DENYING REHEARING

COURT OF APPEALS
OF THE STATE OF GEORGIA Atlanta, May 19, 1982

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

63246 J.P. Counihan, Jr., Adm'r. v. Department of Transportation of Georgia et al

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA May 19, 1982

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Alton Hawk, Clerk

APPENDIX "C"

NOTICE OF THE SUPREME COURT OF GEORGIA DENYING THE WRIT OF CERTIORARI

Clerk's Office, Supreme Court of Georgia

Atlanta June 24, 1982

Case No. 38870. Counihan, Admr. v. Department of Transportation of Georgia et al.

The Supreme Court of Georgia today denied the writ of certiorari in this case.

All the justices concur, except Hill, P.J., and Smith, J., dissent.

Very truly yours,

Mrs. Joline B. Williams, Clerk

APPENDIX "D"

CONSTITUTIONAL PROVISIONS INVOLVED

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

AMENDMENT V-Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE FOURTEEN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

AMENDMENT XIV.-Citizenship; Privileges and Immunities; Due Process; Equal Protection: Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

APPENDIX "E"

STATUTES INVOLVED

95A-304 SUITS BY OR AGAINST THE DEPARTMENT

(a) SUITS AND SETTLEMENT OF CLAIMS

The department shall have the authority to bring suits, and it may be sued in such actions as permitted by law. In addition, the department may adjust and make settlement of any and all claims presented to it under oath.

(b) VENUE AND SERVICE OF PROCESS

All suits brought ex contractu by or against the department shall be brought in a county where any part of the work is to be or has been performed. All other suits by or against the department shall be brought in the county in which the cause arose. Service upon the department shall be sufficient by serving a second original process issued from the county where the suit is filed, upon the Commissioner of the Department of Transportation personally or by leaving a copy of the same in the office of the Commissioner in the State Highway Building, Atlanta, Georgia.

(Acts 1973, pp. 947, 983; 1974, pp. 1422, 1428.)

95A-305 LIABILITY OF DEPARTMENT FOR CERTAIN SUITS AGAINST COUNTIES

(a) SUIT FOR DAMAGES IN CAUSE ACTION ACCRUING ON PUBLIC ROAD TAKEN OVER BY DEPARTMENT

The Department of Transportation shall defend any suit, and be responsible for all damages awarded therein, in any court of this State against any county under existing laws whenever the cause of the action accrues on a public road which at the time of accrual had been designated by the department as a part of the State Highway System: Provided, that no suit under this section may be brought until the construction of the public road on which the injury complained of occurred has been completed and such public road has been officially opened to traffic as provided in subsection (b) of this section. When any such suit is brought against a county in any court of this State, it shall be the duty of the plaintiff to provide for service of notice the pendency of such suit against the county upon the Department of Transportation by providing

for service of a second original process, issued from the court where the suit is filed, upon the Commissioner of the Department of Transportation personally or by leaving a copy of the same in the office of the Commissioner in the State Highway Building, Atlanta, Georgia. The service of process in such suit upon the county shall not be perfected until such second original process has been served as herein provided. The Department of Transportation shall also have the right and authority to defend, adjust, and settle in the name of such county and on its behalf any claim for damages for which the department ultimately may be liable under this Section.

(b) OFFICIAL OPENING OF ROAD TO PUBLIC

A public road shall be officially opened to traffic within the meaning of this section on the date that the department gives written notice to the contractor or political subdivision performing the work on such road of final acceptance of such work, or otherwise in writing acts so as to open traffic by the general public.

(acts 1973, pp. 947, 982.)

69-301 (897) MUNICIPAL CORPORATIONS LIABLE FOR WHAT

Municipal corporations shall not be liable for the failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they shall be liable.

(69 Ga. 542).

APPENDIX F

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

CASE NO. 63246
(Supreme Court of Georgia
Case No. 38870)

JOSEPH P. COUNIHAN, JR., As Temporary Administrator of the Estate of ANNE FAHEY COUNIHAN, Deceased, for the benefit of said Estate and himself Individually, and for the benefit of JOSEPH P. COUNIHAN, ANNE COUNIHAN, SHEILA COUNIHAN WINDERS, and DEBRA COUNIHAN CARROLL,

Appellants,

VS.

DEPARTMENT OF TRANSPORTATION OF GEORGIA; CHATHAM COUNTY COMMISSIONERS; JOE E. LAMBRIGHT, Individually, and as Chatham County Administrator; HUDSON WISE, Individually and as Administrator of Chatham County Public Works; and AL ST. LAWRENCE, Individually and as Chief of Chatham County Police,

Appellees.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that JOSEPH P. COUNIHAN JR., Administrator, et

al., the Appellants in the above styled case, hereby appeal to the Supreme Court of the United States from the final judgment entered by the Court of Appeals of Georgia on April 21, 1982, upon which rehearing was denied by the Court of Appeals of the State of Georgia on May 19, 1982, and application for the Writ of Certiorari in the Supreme Court of Georgia was denied by the Supreme Court of Georgia on June 24, 1982. Said decision of the Court of Appeals affirmed a Motion to Dismiss entered by the Superior Court of Chatham County, Georgia, entered on July 20, 1981, dismissing the complaint of plaintiffs against the defendants in the court below on the ground that defendants are protected from the claim of plaintiffs by sovereign immunity.

II. The Appellants appeal from the full judgment of the Court of Appeals of Georgia entered on April 21, 1982, that became a final judgment on June 24, 1982, upon denial of the Writ of Certiorari by the Supreme Court of Georgia, pursuant to Title 28 USC Sec. 1257(2), on the ground that said decision of the Court of Appeals of Georgia was in favor of the validity of a State statute, as codified in Ga. Code Ann. Secs. 95A-304 and 95A-305 (Ga. Laws 1973, pp. 947, 983; 1974 pp.1422,1428), that Appellant contends is repugnant to the Constitution of the United States.

III. The Clerk of the Supreme Court of Georgia will please prepare the entire record in this cause to certify said record and provide for the transmission of this record to the Supreme Court of

the United States, and include in said record the following:

1. Complaint filed November 6, 1979.

2. Answer of Department of Transportation of Georgia, dated June 20, 1980.

3. Defenses and Answer of defendants Chatham County Commissioners, Joe E. Lambright, Hudson Wise and Al St. Lawrence, filed June 24, 1980.

4. Motion to Dismiss filed by the Department of Transportation on Match 26, 1981.

5. Motion to Dismiss filed by Chatham County Commissioners on March 26, 1981.

6. Order dismissing the Department of Transportation, dated July 20, 1981.

7. Order dismissing defendants Chatham County Commissioners, County Police Chief, County Administrator and

County Public Works Chief, dated July 20, 1981.

8. Decision of the Court of Appeals dated
April 21, 1982.

9. Copy of Order entered by the Court of Appeals of Georgia on May 19, 1982, denying Motion for Rehearing.

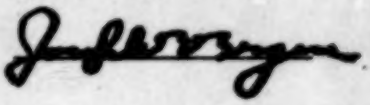
10. Copy of Notice from the Clerk of the Supreme Court of Georgia that the Supreme Court of Georgia denied the Writ of Certiorari to the Court of Appeals of Georgia, dated June 24, 1982.

11. Copy of this Notice of Appeal to Supreme Court of the United States dated September 20, 1982.

12. Proof of Service.

September 22, 1982.

JOSEPH B.BERGEN
Attorney for
Appellants



125 Habersham Street
Savannah, Georgia 31401

912/233-6600

PROOF OF FILING AND SERVICE

I, the undersigned JOSEPH B. BERGEN, Attorney of Record for the Appellants and a member of the Bar of the Supreme Court of the United States, depose and say that on the 22nd day of September, 1982, I filed the original foregoing Notice of Appeal to the Supreme Court of the United States with Mr. Alton Hawk, Clerk of the Court of Appeals of Georgia, whose Post Office Address is: 433 State Judicial Building, Atlanta, Georgia, 30334, and I served three copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the Honorable Michael J. Bowers, Attorney General of the State of Georgia, whose Post Office address is: 132 State Judicial Building, Atlanta, Georgia, 30334, and Fred S. Clark, Esquire, Chatham County Attorney, whose address is: Lee and Clark, Post

Office Box 8205, Savannah, Georgia, 31412, and also one copy of said notice on Mrs. Joline Williams, Clerk of the Supreme Court of Georgia,whose post office address is: 433 State Judicial Building, Atlanta, Georgia, 30334, who are all the parties required to be served, by placing said copies of said Notice of Appeal in an authorized depository for mail at the United States Post Office at Savannah, Georgia in a properly addressed envelope with sufficient prepaid postage thereon to insure First Class Certified Mail delivery within the time allowed for

filing to Messrs. Hawk and Bowers and Mrs. Williams and by hand delivery to Mr. Clark.

This 22nd day of September, 1982.

Joseph B. Bergan
Attorney for
Appellants

Sworn to and subscribed before me
This 22nd day of September, 1982

Ellen F. Upchurch
Notary Public, Georgia

[Notarial Seal]
My commission expires: October 13, 1985.